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Charles F. Gauvin
President
Chief Executive Officer

December 6, 2004



Surface Transportation Board
Case Control Unit
Washington, DC 20423
Attn: Kenneth Blodgett5
STB Docket No. FD 30186 (Sub-No. 3)

Re: Trout Unlimited's Comments on STB's Tongue River III DSEIS

Dear Mr. Blodgett:

Trout Unlimited's mission is to conserve, protect, and restore North America's coldwater fisheries and their watersheds. Trout Unlimited was founded in 1959 in Grayling, Michigan on the banks of the Au Sable River. From this beginning, Trout Unlimited has grown to a national organization with 135,000 members in 35 state councils and 500 local chapters. Trout Unlimited has western offices in Montana, Wyoming, Washington, Colorado, Oregon, Utah, California, and Idaho.

We are concerned about the effects that the Proposed Western Alignment described in the Tongue River III Draft Supplemental Environmental Impact Statement (DSEIS) and the proposed realignment to the Tongue River I and Tongue River II projects will have on the coldwater fisheries located in the Tongue River Basin. This letter serves both as an expression of our concern about the project and the sufficiency of the DSEIS.

I. THE PROPOSED ACTION NEGATIVELY AFFECTS AQUATIC RESOURCES

There are important aquatic resources in the Tongue River Basin. The STB's Section of Environmental Analysis (SEA) acknowledges that there are extensive coldwater fishery resources in the vicinity of the Western Alignment and that the Tongue River Reservoir is critical to the fishery. The Tongue River Basin supports 44 fish species – 37 of which are present in the area affected by the Western Alignment. The Proposed Action would bring the rail line closer to the River than the approved Tongue River II route. The increase in sedimentation in

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the river as a result of the Western Alignment could prove problematic for aquatic resources. The new route would increase the number of non-perennial stream crossings, nearly double the volume of earth moved (by seven million cubic yards) and double the potential increase in sediment load (tons/year) in the Tongue River. DSEIS xxi.

The Western Alignment would threaten the fishery. The SEA concedes that the Proposed Action would increase sedimentation and increase the potential for toxic spills and loss of habitat as a result of increased restrictions to the floodplain. DSEIS 4-70. While it is clear that this will have a serious impact on aquatic resources and coldwater fisheries in particular, the SEA recommends proceeding with the Western Alignment even though "[c]omplete information is not yet available on the potential impacts to fish species." DSEIS 4-90. The information that does exist clearly indicates that trout will be particularly impacted by construction activities. Trout are likely to see an increase in gill irritation as a result of the sedimentation. *Id.* The permanent loss of spawning areas seems certain. *Id.*

Moreover, the DSEIS purports to re-evaluate portions of the Tongue River I and II EISs. The DSEIS concludes that there have not been changes to the fisheries habitat in the portions of the project evaluated by Tongue River I and Tongue River II since the previous EISs were prepared. Yet this analysis is based on aerial photos from 1997. With no more analysis than a seven year old aerial photo, the SEA concludes that "it is difficult to make conclusive determinations" but assumes that "new proposed mitigation would adequately address the changes in instream fisheries." DSEIS 5-12. These assumptions do not constitute environmental analysis. Until the environmental analysis of the fisheries is started, let alone complete, it seems premature to approve the Western Alignment or the realignment of the Tongue River I and II projects.

While cognizant and appreciative of the many mitigation measures that the SEA lists in the DSEIS, Trout Unlimited is concerned that there is no mechanism to enforce the mitigation measures. Even if enforced, there is little discussion in the DSEIS of the efficacy of the mitigation measures with respect to the fisheries and related habitat. Without additional data and analysis on the impact of the Western Alignment to fisheries and related habitat, or on the efficacy and impact of the mitigation measures it appears inappropriate to approve the Proposed Action.

II. THE PROPOSED ACTION NEGATIVELY AFFECTS WATER QUALITY

Although relative to other watersheds the Tongue River is fairly clean, the present water quality of the Tongue River and the Tongue River Reservoir does not fully support the identified beneficial uses. One of the beneficial uses is as a coldwater fishery. To that end, the State of Montana has assigned TMDLs to prevent further deterioration of water quality and to improve the hydrology of the Basin. Trout Unlimited believes that any action approved by the STB should ensure that the water quality of the Tongue River Watershed is not diminished.

Despite its recognition that the Tongue River watershed needs improvement, the SEA recommends approval of a project that it concludes would "increase sediment loads and suspended solids due to (1) active construction in waterways during installation of bridges and culverts; (2) changes in surface water patterns and shallow aquifer flow patterns due to topographic and drainage-pattern changes (e.g. cut and fill and the crossing of drainages); and (3) the temporary effects of water consumption for dust suppression." DSEIS 4-108. Likewise, diesel fuel spills, coal spills and herbicides, applied during operation and maintenance activities, are possible and would negatively affect the water quality of the Tongue River and Tongue River Reservoir.

Trout Unlimited remains concerned that the DSEIS does not adequately evaluate the changes in the hydrology and water quality of the Tongue River since the Tongue River I and II EISs were completed. It appears that the extent of the analysis is a notation that the new alignment will be further from the river and thus "the proposed Tongue River I and Tongue River II alignment would not affect the normal variations in streamflows that occur in the Tongue River Valley and that no mitigation is required to address variations in streamflows." DSEIS 5-15. The effects of site-specific location changes in alignment should be evaluated before approval – while distance on a map may appear to indicate less of an impact, this is not necessarily indicative of the change's impact to the Tongue River. Site-specific hydrology corresponding with the changes in the alignment must be addressed.

Again, the DSEIS has few details on the efficacy and enforceability of the proposed mitigation measures. Without that level of detail the public is left without the ability to fully evaluate the environmental impacts of the project.

Trout Unlimited urges further investigation and analysis before approval of the Proposed Action.

III. STB'S ANALYSIS OF THE ENVIRONMENTAL IMPACTS OF THE WESTERN ALIGNMENT VIOLATES THE NATIONAL ENVIRONMENTAL PROTECTION ACT.

The analysis of environmental impacts of the Proposed Action in the DSEIS is inadequate as it fails to take the requisite "hard look" at the Proposed Action's effect on water quality and aquatic resources. It appears that the DSEIS relies heavily on the Tongue River I and Tongue River II EISs to discuss potential impacts, but only addresses effects of realignment in Tongue River I or Tongue River II and the proposed Western Alignment in general terms. NEPA requires more than general statements. *Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379-80 (9th Cir. 1998). Moreover, the DSEIS suggests that the fishery analysis is self-avowedly incomplete – the DSEIS must do more than identify potential environmental impacts, it must establish the magnitude and intensity of the impact. *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 743 (9th Cir. 2001).

SEA's reliance on the 1986 and 1996 Tongue River I and II proposals is inappropriate. The analysis in the underlying environmental impact statements for Tongue River I and Tongue River II proposals, which were relied upon by the STB in the present DSEIS, is outdated. Concluding that virtually nothing had changed since 1986, SEA conducted only a "focused review" of its prior EISs and addressed only changes in the proposed project. See, e.g., DSEIS at 3-6 to 3-7; DSEIS at 3-9. Yet SEA's conclusion that nothing has changed appears unreasonable is contrary to the facts. SEA offers only conclusory statements in support of its reliance on the previous EISs. See DSEIS at 3-7 ("SEA's analysis of environmental circumstances and environmental regulations and laws determined that little has changed since the EIS was prepared for Tongue River I."). The DSEIS should be supported by evidence that the agency has made the necessary environmental analysis. See 40 C.F.R. § 1502.1; *Citizens Against Toxic Sprays, Inc. v. Bereland*, 428 F. Supp. 908 (D. Ore. 1977). The Tongue River III comparison between current conditions and conditions at the time of each of the previous EISs focuses chiefly on aerial photography comparisons and some limited site visits and does not adequately evaluate potential differences. See, e.g., DSEIS at 3-6 to 3-7; 3-9.

SEA's reliance on Tongue River I and Tongue River II has led it to ignore or fail to adequately discuss:

- New baseline conditions. *See, e.g.,* 40 C.F.R. § 1502.15; *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).
- "Reasonably foreseeable development," which also has changed dramatically since 1986. *See, e.g.,* 40 C.F.R. §§ 1508.7; 1508.8; 1502.1.
- Changes in current area activities, resulting in changes to direct, indirect and cumulative impacts. *See, e.g.,* 40 C.F.R. §§ 1508.8; 1508.7, 1502.1.
- Changes in the environment and resources subject to the project's impacts (e.g., changes in endangered, threatened and sensitive species, changes in air and water quality, etc.). *See, e.g.,* 40 C.F.R. §§ 1508.8; 1508.7, 1502.1.
- A "no action alternative." The DSEIS does not separately address the no action alternative but relies completely on the old EISs in violation of NEPA. *See* 40 C.F.R. § 1502.14(d).

These issues should be fully addressed in the DSEIS. Without this information it is difficult for Trout Unlimited, indeed the entire public, to fully and fairly evaluate the proposed action.

By evaluating the proposed railroad in three stages the SEA has effectively segmented the project in violation of NEPA. SEA conducted three separate EISs, at three very different times, covering separate areas and aspects of the project. Because SEA failed to update the old EISs or cumulatively analyze the impacts of the three segments of the project, SEA's analysis contravenes NEPA's requirements. Indeed, the wisdom of the prohibition against segmenting is evident here. In the present situation the project has changed dramatically over 20 years with no systematic evaluation of the entire project. If STB does approve the Proposed Action, the Tongue River Railroad will have been effectively approved without a systematic environmental review.

NEPA requires the government agency conducting the environmental review to fully evaluate and quantify the effects of mitigation measures. Not only is that analysis absent from the DSEIS, the DSEIS is silent as to enforcement

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mechanism other than the goodwill of those constructing the railroad. NEPA requires more. See, e.g., *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380-81 (9th Cir. 1998); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989). Without this mitigation analysis, the public will not have adequate tools to evaluate the project.

As expressed above, Trout Unlimited has reservations about the impact of the Proposed Action on aquatic life and water quality. The analysis provided in the DSEIS appears perfunctory and shallow, leading, in our opinion, to a DSEIS that violates the spirit and letter of NEPA.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Gauvin', with a long horizontal flourish extending to the right.

Charles F. Gauvin